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InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Defendant.

Case No. CV-03-450-E-LMB

DEFENDANT/THIRD-PARTY
PLAINTIFF INTERDENT SERVICE
CORPORATION'S OPPOSITION TO
ORTHODONTIC CENTERS OF IDAHO,
INC.'S MOTION TO QUASH

INTERDENT SERVICE CORPORATION, a
Washington corporation,

DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S
OPPOSITION TO ORTHODONTIC CENTERS OF IDAHO, INC.'S MOTION TO QUASH - 1

Third-Party Plaintiff,

v.

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation; DWIGHT G.
ROMRIELL, individually; LARRY R.
MISNER, JR., individually; PORTER
SUTTON, individually; ERNEST SUTTON,
individually; GREGORY ROMRIELL,
individually; ERROL ORMOND,
individually; and ARNOLD GOODLIFFE,
individually,

Third-Party Defendants.

I. INTRODUCTION

Most of the issues related to this motion have been briefed in InterDent Service Corporation's ("ISC") pending TRO papers and in response to the motion to quash filed by the employer of third-party defendant Dr. Larry Misner, Dr. Larry Bybee and his company, Valley Dental. The witness moving to quash here, ISC competitor, Louisiana-based Orthodontic Centers of America ("OCA."), financed Misner's competing dental office, leased the space for him and obtained his equipment, thus facilitating in every way possible Misner's breach of his noncompete agreement. More important, evidence from OCA will demonstrate the pretextual nature of Misner's, plaintiff Pocatello Dental Group's and the third-party defendants' complaints about ISC's conduct. Despite Misner's stated disdain for "foreign for-profit corporations" managing dental offices, ISC expects the evidence will show that OCA's practices are in many respects similar to ISC's: that OCA simply offered Misner more money and that greed rather than concern about the "unlawful corporate practice of dentistry" is the PDG shareholders' principal motivation.

DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S
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In any event, this motion can be denied without reaching the merits for OCA's failure to meet and confer as is required by Local Rule 37.1. OCA complains about the fact that it was subpoenaed for deposition in Boise, the location of its registered agent. Had OCA's counsel—also Misner's counsel—bothered to confer *before* filing this unnecessary motion, counsel would have been informed that the deposition could proceed at any location convenient to the witness. After filing, OCA raised a new argument not stated in its papers: that the Court did not have jurisdiction over OCA or over OCA's objections to discovery despite the fact that OCA regularly does business in Idaho and has a registered agent in the state. This argument is both too late and not well taken.

On the merits, all OCA says is that it is not a party to this action. Of course, it is somewhat less than extraordinary that a third-party witness would have discoverable information. Here the relevance is obvious: what promises were made to Misner to induce him to breach his noncompetes? How long has Misner's scheme been in development and how is it connected to the claims PDG made and withdrew in bankruptcy? How, if at all, do OCA's practices differ from ISC's with regard to the alleged "unlawful practice of dentistry?" OCA has no excuse for disregarding the duty of every citizen to provide evidence in pending legal proceedings.

II. ARGUMENT

A. OCA's Motion Should Be Denied for Violation of Civil Rule 37.1

Civil Rule 37.1 requires counsel to make a reasonable effort to reach agreement *before* filing a discovery motion and to state as much in their motion. OCA does neither. OCA's counsel never contacted ISC's counsel regarding the subpoena. (Affidavit of Scott J. Kaplan in

Opposition to Orthodontic Centers of Idaho, Inc.'s Motion to Quash ¶ 2 ("Kaplan Aff.")). The deposition was noticed for Boise because OCA's registered agent in Idaho is located in Boise. Had OCA's counsel contacted ISC's counsel, they would have been informed that the deposition could proceed in Metairie, Louisiana or such other location as is most convenient for the witness. (*Id.*) Because of this violation of the local rules, the motion should be denied and ISC awarded its fees and costs in responding to the motion.

B. OCA Is Subject to the Jurisdiction of This Court

Weeks after filing its motion to quash *in this Court*, OCA finally did get around to conferring about it. OCA then raised a new argument: that despite regularly doing business in Idaho¹ and having a registered agent for service in the state,² the Court had no jurisdiction to issue a subpoena to OCA or to resolve OCA's objections to discovery. (Kaplan Aff. ¶ 3.) Rule 45(3)(A)(ii) does permit a witness to move to quash or modify a subpoena requiring the witness to travel more than 100 miles from where he resides, does business or "regularly transacts business in person." Given that OCA regularly transacts business in person within the District of Idaho, OCA's objection does not appear to be well taken. *Compare In re Price Waterhouse LLP*, 182 F.R.D. 56, 63 (S.D.N.Y. 1998) (foreign corporation not subject to subpoena under Rule 45 in a state where it does not "regularly transact business"). Instead, as common sense dictates, the discovery objections raised by Orthodontic Centers of Idaho in a case pending in the District of Idaho involving OCA's conduct with regard to Idaho dentists should be resolved in the District of Idaho.

¹ See Kaplan Aff., Ex. 3 (deposition excerpts from the Deposition of Dr. Leroy Russell Misner, Jr. at 22-23, 30-31 (discussing OCA "site visits")).

² See Kaplan Aff., Ex. 4.

C. The Documents and Testimony Are Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Even though OCA financed the Misner/Bybee practice that is in violation of Misner's noncompete, leases the property to him and provides his equipment, it is true, as OCA notes, that it is not a party to this case. However, this does not relieve OCA of its duty to respond to a lawful subpoena. ISC has a right to "every man's evidence." *U. S. v. Nixon*, 418 U.S. 683, 709 (1974).

The relevance of information in OCA's possession is discussed above and in the prior briefing. Consequently, ISC will only provide a succinct summary for the convenience of the Court. First, OCA will have evidence relating to the timing and nature of Misner's scheme to evade his noncompete and the involvement in the scheme of the other PDG shareholders. More important, there is evidence in the record that the claims made by PDG and its shareholders in this case are merely a pretext for their attempts to evade their noncompete agreements. (*See Affidavit of Kevin Webb in Support of ISC's Motion for a Temporary Restraining Order (Misner Noncompete)*, Ex. 3.) The contractual arrangements between Misner, Bybee and OCA may show, for example, that Misner's complaints are indeed pretextual if, *during the pendency of these proceedings*, he and Bybee entered into a substantially similar agreement with OCA. The OCA agreement may also support ISC's argument that the provisions of its management are commonplace and standard in the industry. Moreover, Misner and Bybee claim that their noncompete agreements with ISC and PDG are unenforceable. If they entered into similar agreements with OCA, this would certainly put into question the credibility of their assertions.

ISC's arguments are not mere speculation. ISC has obtained from the public record an OCA form of management agreement (entitled "Consulting and Business Services

Agreement").³ (Kaplan Aff., Ex. 1 at 12.) This agreement contains many of the provisions complained about by PDG here. For example:

- OCA employs and schedules the staff and administers the payroll. (*Id.*, § 1.3.)
- OCA purchases inventory and supplies. (*Id.* at 13, § 1.5.)
- OCA provides accounting and bookkeeping services. (*Id.* at 12-13, § 1.4.)
- OCA is responsible for arranging legal services (if it is to pay for them) other than for malpractice litigation. (*Id.* at 13, § 1.7.)
- OCA provides billing and collection services. (*Id.*, § 1.10.)
- OCA pays the practice expenses and its fee out of accounts receivable. (*Id.*, § 1.11.)
- OCA is entitled to make all disbursements from an account in the PC's name. (*Id.* at 13-14, § 1.12.)
- There is a two-year noncompete agreement between OCA and the PC shareholders upon their leaving the PC. (*Id.* at 16, § 2.9.) In this case the PDG shareholders executed a separate noncompete agreement contemporaneously with the Management Agreement, but the effect is the same.

There are also significant differences between the OCA Management Agreement (with the Oregon OCA PC at least) and ISC's. First and most important to Misner, ISC expects, is that

³ The agreement is attached as an exhibit to a complaint OCA filed in Oregon to enforce a noncompete agreement with a shareholder of a PC it manages. The agreement is actually between Orthalliance, Inc. and the Oregon PC. However, as indicated in the OCA news release attached as Kaplan Aff., Ex. 2, Orthalliance is a wholly owned subsidiary of OCA. Exhibit 2 also shows that the PDG shareholders are not the first to raise the "unlawful practice of dentistry" argument and that the argument does not prevent the enforcement of noncompete agreements.

OCA's management fee is specified to be 17 percent of adjusted gross revenues. (Kaplan Aff., Ex. 1 at 16, § 3.1.) In contrast, the management fee ISC's predecessor negotiated with PDG's shareholders is completely dependent upon the extent to which it can control costs and is not a fixed amount. Additionally, the OCA PC, unlike PDG, did not assign its revenues and accounts receivable to the management company as security. (See Dental Office Management Agreement, ISC's Amended and Supplemental Counterclaims, Ex. 1, § 2.6.)

For the purpose of this motion, the principal questions in discovery will be the similarities and differences between the Misner/Bybee OCA agreement and ISC's Management Agreement with PDG, as well as how the OCA agreement is administered in practice. Another important question is whether Misner, while contending his noncompete with ISC is ineffective, nonetheless agreed to be bound either directly or indirectly (in the OCA agreement with his employer) to a similar noncompete with OCA.

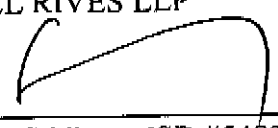
The OCA documents and testimony are discoverable and highly relevant.

III. CONCLUSION

OCA's motion should be denied.

DATED: August 3, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Defendant/Third-Party Plaintiff InterDent Service Corporation's Opposition to Orthodontic Centers of Idaho, Inc.'s Motion to Quash** on the following named persons on the date indicated below by

- ☐ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☒ overnight delivery

to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at his or her last-known addresses indicated below.

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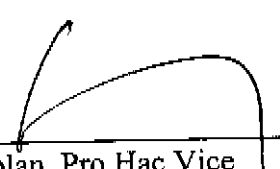
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